#### UNITED STATES OF AMERICA

## BEFORE THE NATIONAL LABOR RELATIONS BOARD

OAKTREE CAPITAL MANAGEMENT,	Cases	37-CA-6601-1
LLC, and TBR PROPERTY LLC, a SINGLE		37-CA-6642-1
EMPLOYER, d//b/a TURTLE BAY		37-CA-6669-1
RESORTS, and BENCHMARK		37-CA-6691-1
HOSPITALITY, INC.		37-CA-6730-1
		37-CA-6753-1
		37-CA-6756-1
and		37-CA-6768-1
		37-CA-6816-1
		37-CA-6826-1
UNITE HERE! LOCAL 5		37-CA-6827-1
		37-CA-6835-1
		37-CA-6840-1
		37-CA-6875-1
		37-CA-6877-1
		37-CA-6878-1

RESPONDENTS OAKTREE CAPITAL MANAGEMENT LLC, AND TBR PROPERTIES LLC, A SINGLE EMPLOYER d/b/a TURTLE BAY RESORTS' AND BENCHMARK HOSPITALITY, INC.'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE SUPPLEMENTAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

#### I. INTRODUCTION

On March 29, 2009, a two-member panel of the National Labor Relations Board (hereinafter "the Board") in *Turtle Bay Resorts and Benchmark Hospitality* 353 NLRB No. 127 (2009) ("03/29/09 Decision") found in agreement with Administrative Law Judge Gontram ("ALJ Gontram") that Oaktree Capital Management LLC, TBR Property LLC, and Benchmark Hospitality, Inc. (hereinafter "Respondents") engaged in a number of unfair labor practices in violation of Section 8(a)(1), (3) and (5) of the National Labor Relations Act relating to union access, trespass, rules violations, and the failure to provide information requested by the Union. <sup>1</sup>

However, the Board disagreed with ALJ Gontram's analysis and conclusion relating to Respondents' parking validation policy at the Resort with respect to Union business agents. *Id.* ALJ Gontram found that "there was no evidence of the amount the Respondents require union representatives to pay for parking," and that therefore he was "unable to conclude that the change in parking validation policy was a significant change

<sup>&</sup>lt;sup>1</sup> Respondents' appeal before the Fifth Circuit Court of Appeals concerns certain findings and conclusions of the Board in its underlying decision, including that one of Respondents, Oaktree Capital Management ("Oaktree"), is not a "single employer with TBR Property and a joint employer of the Resort's employees with Benchmark Hospitality", and certain other findings and conclusions. Some of these other findings and conclusions were relied upon by ALJ Cracraft in her supplemental decision. Respondents respectfully request that the Board take judicial notice of the appeal and Respondents' brief to the Fifth Circuit. Respondents will submit to the Board its brief to that court upon the completion and submission of the brief to the Fifth Circuit. Should the Fifth Circuit conclude Oaktree Capital Management is not a joint employer with Benchmark Hospitality and/or otherwise determine Oaktree is not a party, Respondents submit the Board should strike Oaktree from the caption of this supplemental decision and remove it from any subsequent proceedings.

that would require the Respondents to bargain before making the change." *Id.* slip op at 2.

In the 03/29/09 Decision, the Board noted that an <u>estimate</u> of the value of the parking that union representatives had received (and <u>not paid</u>) between 2003 and March 31, 2005, is established by (1) the testimony of Human Resources Director Nancy Ramos ("Ramos") and (2) three LM-10 forms Respondents filed with the Department of Labor. The Board then 'reasoned' that there is evidence of the monetary amounts at issue for the parking privileges allegedly unilaterally revoked by the Respondents, and therefore ordered an Administrative Law Judge<sup>3</sup> "to <u>consider this evidence</u> and to issue a supplemental decision analyzing whether the Respondents violated Section 8(a)(5) as alleged." *Id.* at slip op. pg. 2-3.

On August 17, 2009, Administrative Law Judge Mary Cracraft ("ALJ Cracraft") issued her supplemental decision ("SALJD") and order finding that Respondents violated Section 8(a)(5) and (1) by "unilaterally altering the parking validation policy for Union

<sup>&</sup>lt;sup>2</sup> ALJ Gontram also held: "It may be that the parking fee is so high as to constitute a significant change (the approximate / mile distance from Turtle Bay's entrance to the hotel would enhance the interference imposed by an inordinately high fee), or so low as to constitute an insignificant change. In addition, there is no evidence that union representatives have come to Turtle Bay any less frequently after the change in parking privileges than before the change ... For the foregoing reasons, I am unable to conclude that the change in parking privileges was a significant change that would require the Respondents to bargain before making the change. Accordingly, I will recommend that this allegation be dismissed." (*Id.* at 40)

<sup>&</sup>lt;sup>3</sup> ALJ Gontram died between the time of the hearing and the Board's issuance of its 03/29/09 Decision. As such, the Board ordered remand of the parking validation issue to Chief Administrative Law Judge Robert Giannasi. The Chief ALJ assigned the matter to ALJ Mary Miller Cracraft pursuant to Board Rules and Regulations Section 102.36.

agents who were present at the facility to service the collective-bargaining contract."4 (SALJD at 6) (Exception #1) ALJ Cracraft found that "rescission of the parking validation practice was a material, substantial and significant change." (SALJD at 2) (Exception #3) ALJ Cracraft then ordered Respondents to: (1) cease and desist from unilaterally changing the practice of validating parking for Union business agents; (2) rescind the change in the parking validation practice and reinstate the practice of validating Union business agents' parking tickets for Union business agents present at the Resort for representational duties; and (3) make the Union whole for any amounts incurred for the parking after the rescission of the parking validation practice. (SALJD at 7) The ALJ also "recommended" such language be inserted in the Order set forth in Turtle Bay Resort, 353 NLRB No. 127 (2009). (SALJD at 7)

#### II. **FACTS**

Respondent Benchmark Hospitality, Inc. operates Turtle Bay Hotel and Resort in Kahuku, Hawaii on the Island of Oahu. The Union, which represents approximately three hundred sixty (360) employees at the Resort, has represented the Resort's employees since 1999. (SALJD at 2:16-18) During the period at issue, the parties' most recent collective bargaining agreement expired on November 25, 2003, but Respondents for the most part honored the provisions contained in the expired contract. (SALJD at 2:18-23) Since approximately 2002, Union business agents have visited unit employees at the Resort approximately twice a week for the entire day. (SALJD at 2:23-26)

Respondents take exception to this finding.

<sup>&</sup>lt;sup>4</sup> ALJ Cracraft also phrased this somewhat differently, "Respondents violated Sec. 8(a)(1) & (5) by unilaterally eliminating parking validation for Union agents who were present at the resort to perform representational duties pursuant to the terms of the expired CBA." (SALJD at 2) (Exception #2) For the reasons discussed in this Brief,

The expired collective bargaining agreement contained a union access provision that provided:

Authorized representatives of the Union shall be free to visit the hotel at all reasonable hours and shall be permitted to carry on their duties, provided they shall first notify the management or its designated representative, and there shall be no interference with the normal conduct of business. *Turtle Bay Resorts and Benchmark Hospitality* 353 NLRB No. 127, slip op. 9 (2009).

The collective bargaining agreement did not contain any language permitting Union business representatives to park for free in the Resort's parking lots, and Respondents deny such a privilege was ever granted by the Respondents.

Union business representative Marian Marsh ("Marsh") offered the most extensive testimony about the origin and existence of the alleged free parking privilege. Marsh testified that when she first went to Turtle Bay as a Union representative, she was told by another business representative, who Marsh did not identify, that parking was validated by the hotels. Marsh also testified, contrary to the experience and testimony of Human Resources Director Ramos. Ramos, who had worked in the hotel industry for more than twenty (20) years before working at Turtle Bay Resort, testified that the industry-wide practice is not to provide free parking for Union business agents. (Tr., Marsh, 818:11-819:1; Tr., Ramos, 3792:15-3793:4) Marsh did not identify any provision, either in the expired collective bargaining agreement or in a side-letter, which substantiates this alleged privilege. Marsh also vaguely testified that when she first went to Turtle Bay, she asked if parking was validated, but she does not know who she asked. (Tr., Marsh, 818:11-819:1) If Marsh asked at all, it is clear she did not ask anyone in senior management, as the Resort extended no such free parking privilege to Union business representatives.

5

Marsh explained that during the time she was assigned to Turtle Bay, she either took a ticket from the machine at the parking kiosk or from the parking attendant stationed there. She "validated" the parking ticket when she signed in at security and she inserted the ticket into the validation machine on her departure, i.e. the ticket says "pay \$0.00." Thus, Marsh was never charged a parking fee. (Tr., Marsh, 870-87) Marsh also testified she initially had her parking ticket validated by a security guard but, **thereafter**, **she "validated" her own tickets**. (Tr., Marsh, 812:9-813:12) Marsh testified that she parked without paying on many occasions, including February 14, 2004 and June 2, 2004. (Tr., Marsh, 930-931, 958 – 959) Marsh also testified that she sometimes parked in the parking lot and she sometimes parked in the bus zone. (Tr., Marsh, 700:24-701:5, 927-929)

Several other business agents also testified about the parking issue. For example Business Agent Jessie Decoite ("Decoite") watched Marsh take a ticket at the kiosk. Decoite never took a ticket to park because she has always been the passenger. (Tr., Decoite, 1815-1818) Business Agent Kim Harman ("Harman") testified she typically stops at the parking booth to get a ticket and she parks near the valet. (Tr., Harman, 1397-1402) Harman used to have her parking "validated." (Tr., Harman, 1694-1697) Business Agent Laura Moye ("Moye") testified she believes she had her parking tickets "validated" three times in January 2005, including on January 19, 2005, and after that she paid. (Tr., Moye, 3349:4-15) Moye parked in the beach access parking a couple of times until Resort Security Director Tom Dougher ("Dougher") told her she was not allowed to park there, and she stopped. (Tr., Moye, 3349:4-15, 3350:9-17)

When Business Agent Nate Santa Maria ("Santa Maria") parked at the resort, he took a parking ticket on the way in, did <u>not</u> get it validated and did <u>not</u> pay for parking. (Tr., Santa Maria, 679:8-681:19) Business Agent Claire Shimabukuro ("Shimabukuro") testified she first started going to the resort from the middle of 2003 through the summer of 2004; she sometimes drove and parked there three to four times a week; **she entered and exited TBR on occasion without taking a parking ticket or paying for parking**. Shimabukuro also testified that she typically parked in the beach access parking lot, and she testified to her mistaken belief that the Resort does not require a beach access parking permit to park in the public beach parking lot. (Tr., Shimabukuro, 1338-1)<sup>5</sup>

Resort HR Director Ramos testified she had a conversation with Marsh in which she informed Marsh that Marsh was not entitled to get her parking validated. (Tr., Ramos, 179 -182) Shortly before this conversation with Marsh, Ramos was told that Marsh often validated her own parking tickets. (Tr., Ramos, 179 -182) Ramos knew that validating the parking tickets of union representatives was unacceptable from her human resources experience with the Waikiki Hyatt Hotel, which never validated the parking tickets of any union business agents. (Tr., Ramos, 3792:15-3793:4) However, Ramos was unaware it was illegal until she saw the letter from Resort's Counsel Robert Murphy, dated January 28, 2005, to the Union. That letter stated that Union business agents could no longer validate their tickets because it violated 28 USC Section 186. (Tr., Ramos, 3742:24-3743:13)

\_ 5

<sup>&</sup>lt;sup>5</sup> It was improper for Union business agents to park in the beach access property while visiting the facility for representational purposes. The beach parking area is mandated as parking for the public while visiting the beach. (Tr., Dougher, 3380:2-3381:14; 3382:5-3383:24)

#### III. ANALYSIS

Respondents submit that ALJ Cracraft erred in finding that Respondents' alleged unilateral alteration of the parking validation policy for Union agents, while present at the facility to service the collective bargaining agreement, violated Section 8(a)(5) and (1) of the Act for the following reasons:

### A. Union Business Agents Were Never Granted a Parking Validation Privilege.

Although the Board's remand in this matter is limited to whether the evidence of the monetary amounts at issue (purportedly established by Respondents' LM-10 forms and Ms. Ramos' testimony) suffice to establish that Respondents' unilateral change was substantial, material, and significant, Respondents submit that they never granted the Union parking privileges. Consequently there was no unilateral change in its parking validation policy with respect Union business agents at the Resort for representational purposes. Respondents take exception to the ALJ's finding/conclusion that "Respondents' practice was to validate the parking for Union Agents. Validation continued, at least for a time, following expiration of the contract." (SALJD at 2) (Exception #4) Respondents do so based on the testimony of Human Director Ramos and the absence of any documentary evidence supporting ALJ Cracraft's finding that Respondents' management ever affirmatively permitted Union representatives to park for free.

Respondents contend that for an unknown period of time, Union agents and representatives went to the Resort's private grounds, passed the restricted parking kiosk guarded entry, took a machine-generated or hand-passed ticket, and then misappropriated parking validation stamps after arriving at the Resort by accessing the validation

machines placed in the security office or in the human resource office, and presented the validated ticket which required no payment on departure. The business agents also circumvented the parking rule by parking in the bus parking zone, in the beach access areas, in construction areas, and at least one representative simply did not validate or pay for parking when parking on Resort property. At the end of 2004 or early 2005, when management, in the person of HR Director Ramos, learned that business agents were validating their parking tickets and/or did not pay for parking, and when Ramos learned of the illegality of the Union agent parking validation scam, the practice was stopped. There was no established or agreed upon procedure for the Union to self-validate its parking tickets, and/or otherwise park at the Resort without paying. Respondents take exception to the ALJ's finding/conclusion that "the practice of providing free parking to the Union representatives while on the property on official business was known and facilitated by Respondents." (SALJD at 2) (Exception # 5) Ramos was not aware of Union business agents' failure to pay for parking until immediately before she notified Marsh that this was not permitted. Ramos had not allowed such a practice at her previous Human Resource engagements with other hotels on Oahu with this same Union.<sup>6</sup> Consequently, Respondents never changed this policy and practice and therefore no 8(a)(5) violation lies.

<u>--</u>

<sup>&</sup>lt;sup>6</sup> Further, the Union business representatives' use of beach access parking and the decision to park in construction areas arguably suggests that the Union was aware they were not entitled to park for free, but simply took advantage of rank and file employees who were either unaware of proper procedure or were acting in concert with business agents. It is rank and file members who staff the parking kiosk and who oversaw issuance of beach access permits. (Tr., Dougher, 3383:13-21).

# B. The ALJ Failed to Support Her Conclusion that the Alleged Change in the Parking Validation Policy was Material, Substantial and Significant

In remanding the parking validation issue to the ALJ, the Board limited the issue to be addressed to whether the monetary amount sufficed to establish that Respondents' alleged unilateral change was material, substantial, and significant. However, ALJ Cracraft never addressed this issue.

1. The ALJ Erred in Concluding that the Context Underlying the Alleged Change in Parking Privilege Establishes A Substantial, Material and Significant Change

ALJ Cracraft found that "in determining whether the unilateral change was material, substantial, and significant, the natural context must be considered." (SALJD at 5). Respondents take exception to this finding and to all findings/conclusions by ALJ Cracraft that exceed the scope of the remand.<sup>7</sup> (Exception #6) The ALJ erred when she

Additionally, many of these findings/conclusions are erroneous, mischaracterize the hearing evidence and/or are not established as final as they are currently before the Fifth Circuit Court of Appeal. For example, Respondents take exception to the ALJ's erroneous finding/conclusion that "Judge Gontram found that all of the above actions

<sup>&</sup>lt;sup>7</sup> Respondents submit that ALJ Cracraft's decision does not comport with the Board's remand in the underlying case. As mentioned above, the Board remanded to the ALJ only the issue of whether the monetary amounts at issue identified in the LM-10 forms and Ramos' testimony sufficed to establish that Respondents alleged unilateral change was material, substantial, and significant. General Counsel agrees with this, and the ALJ recognized this in her supplemental decision. (SALJD 5, fn.4). Despite this, the ALJ focuses her analysis and decision on issues not raised by the remand which are therefore inappropriate for her consideration. In a great portion of her decision, ALJ Cracraft cited to events that have nothing to do with the parking fee issue. Respondents therefore take exception to the ALJ's finding/conclusion that "the chronology of events illustrates amply that the change in the terms of parking was one of many means that the employer used to burden the link between the employees and their exclusive bargaining representative. Respondent's conduct itself towards the Union blocked or burdened the Union's access to the employees at every turn. Thus, Respondents' unilateral change of the parking conditions for Union business agents on the property on official business constituted a material, substantial, and significant change of employees' terms and conditions of employment." (SALJD at 6) (Exception #7)

found that Respondents' unilateral change was material, substantial and significant based on the context in which the alleged unilateral change occurred and consequently violated Section 8(a)(5) and (1), relying on *Microimage Display Division of Xidex Corp.* 297 NLRB 110, 111 (1989) enfd. 924 F.2 245, 253 (D.C. Cir 1991).

First, the Board only ordered the ALJ to consider whether the amounts at issue, as documented by the LM-10 forms and Ramos' testimony, sufficed to establish that the change significantly and materially affected the unit employees. The Board did not direct the ALJ to review whether other circumstances separate and apart from the monetary amounts at issue, sufficed to demonstrate that the change materially, substantially affected the unit employees. Thus, the Board should decline to find an 8(a)(5) and (1) violation based on the context of the alleged unilateral change as this analysis exceeded the scope of the ALJ's authority.

Second, even if considering the context in which the alleged unilateral change occurred did not exceed the scope of the ALJ's authority, the Board should still decline to find the violation because the Board has already considered this evidence and implicitly concluded that the evidence, independent of the monetary amounts at issue, does not suffice to make the unilateral change substantial material and significant. If this were not the case, the Board would have had no need to remand the issue as the Board could have found the 8(a)(5) violation without evaluating whether the monetary amounts at issue

[including the serious of events involving Business Agent Nate Santa Maria on August 6, 2004] by Respondents, with the exception of rescission of parking validation practices, violated Section 8(a)(1) of the Act". (SALJD at 4) (Exception #8) ALJ Gontram, in fact, found that Santa Maria was disturbing the workers as he walked through the work areas of the hotel and that Respondents had a reasonable basis to stop him. ALJ Gontram recommended that this charge (Complaint, paragraph 18) be dismissed. (*Id.* at p. 33)

1 1

suffice to make the alleged change material, substantial, and significant. Therefore, the context in which the alleged unilateral change occurred cannot independently support an 8(a)(5) violation.

Third, the case relied upon by ALJ Cracraft in support of her finding that the unilateral change was substantial, material, and significant, Microimage Display, above, is clearly distinguishable from the instant case. Concededly, the Board and court in Microimage Display considered and found that the context in which the employer unilaterally implemented a two-day change in its unit employees lunch breaks sufficed to establish that the employer materially, substantially, and significantly affected the terms and conditions of the unit employees employment in violation of Section 8(a)(5). However, *Microimage* is distinguishable from the instant case for the following reasons. First, the employer in Microimage Display never contested that the two-day change occurred. Here, Respondents dispute that there was any unilateral change in policy. Second, in *Microimage Display*, the employer changed unit employees lunch hours for two days. In the instant case, the alleged unilateral change was directed at Union business agents, not at unit employees. Thus, in Microimage Display there was no dispute as to whether the alleged unilateral change concerned a mandatory subject of bargaining—a prerequisite to a finding that an employer has a bargaining obligation prior to making changes. Here, the ALJ failed to cite to any case, and we have found none, that demonstrates a parking privilege for Union business agents is a mandatory subject of bargaining where a union access clause, or any collective bargaining agreement provision, fails to provide for business agent parking privileges and where there is no

evidence that the parking privilege vitally affects unit employees terms and conditions of employment.

The vast majority of ALJ Cracraft's decision and analysis focuses on whether the "context" in which the alleged change in parking validation occurred sufficed in and of itself to establish that the alleged change was substantial, material and significant. This she was not permitted to consider. ALJ Cracraft effectively ignored or disregarded the actual issue on remand as she did not analyze whether there was any evidence that the "monetary amounts at issue" resulted in a substantial, material and significant change to the bargaining unit. She simply asserted they did without analyzing the LM-10 forms and Ramos' testimony to support her conclusion. Consequently, Respondents ask that prior to publication of its decision, the Board either strike the decision except for that small portion of the decision that addresses whether the monetary amounts at issue alone suffice to establish that the unilateral change violated Section 8(a)(5). Alternatively, Respondents request that the Board clearly state that the Board, in reaching its conclusion, does not rely on the findings of fact or ALJ Cracraft's analysis where it exceeds the scope of the remand.

Thus, the context in which Respondents allegedly changed the parking validation policy is irrelevant and does not support a determination that the alleged change makes the violation substantial, material and significant and violates Section 8(a)(5).

2. The ALJ Erred in Finding that the Amount at Issue Sufficed to Establish that the Alleged Change in Parking Validation Policy Substantially Materially and Significantly Affected the Terms of the Unit Employees Employment

The Board specifically requested that the ALJ to consider whether the evidence of the monetary amounts at issue (the three LM-10 forms and Ramos' testimony) establish a 13

substantial, material, and significant change to the terms and conditions of unit employees employment. However, ALJ Cracraft never analyzed either the LM-10 forms or Ramos' testimony, nor did she cite to other documentary or testimonial evidence in her supplemental decision to substantiate her finding that Respondents' alleged unilateral change to the parking validation policy substantially, materially, and significantly affected unit employees terms and conditions of employment.

Respondents take exception to ALJ Cracraft's finding/conclusion that "there was evidence in the record that showed that the parking fees assessed totaled approximately \$2,080 per year since 2005." (SALJD at 1) (Exception #9) The record does not show either that Respondents assessed parking fees, that the amount totaled approximately \$2,080 per year since 2005, or that union business paid that, or any amount, in parking fees. It appears that ALJ Cracraft merely assumed the LM-10 forms established that Respondents charged Union agents to park at the Resort when she found the Union paid for parking (\$2080 per year - \$20/day x 2-days a week x 52 weeks), "that the distance walked by business agents (some of whom had physical limitations) and who refused to pay to park is significant, and the time involved in walking the extra distance is substantial." (SALJD at 6:21-28) (Exception #10)

Contrary to ALJ Cracraft's mischaracterization, the LM-10 forms establish only an approximation of the amount of free parking the Union business agents received prior to the alleged unilateral change in the parking validation policy between 2003 and 2005. (GC-4(A-C).)<sup>8</sup> The LM-10 forms do not prove Respondents actually charged and/or

<sup>&</sup>lt;sup>8</sup> The LM10 forms do <u>not</u> state how much, or if, Union business agents paid for parking at the Resort, but rather, the 2003 form (GC Exhibit 4-C), the 2004 form (GC Exhibit 4-

collected **any** parking fees from Union representatives after Respondents' alleged unilateral change in the parking validation policy.

Nor did the ALJ cite to any other evidence to substantiate its claim that Respondents charged Union business agents to park. Common sense dictates that had Respondents actually charged the Union business agents to park at the Resort, the Union business agent and/or the Union would have receipts documenting the fact that they were charged and paid for the parking. The Union business agent would have the receipt so they could seek reimbursement from the Union for this cost or for tax purposes, and the Union would retain such receipts either to support this allegation or for tax reporting purposes. During litigation of this matter, neither the Union, nor General Counsel, presented one scintilla of such evidence. General Counsel did not present any such evidence at the hearing in the underlying case. Based on the absence of any receipts or other documentary evidence, the Board should infer that Union business agents were never charged, and never paid, \$20/day to park or any other amount. There is no evidence that the alleged policy change had any financial or substantive impact on the business agents and by extension the unit employees. Consequently, the alleged change does not substantially, materially, and significantly affect the unit employees employment and does not violate Section 8(a)(5) and (1).

B) and the 2005 form (GC Exhibit 4-A), each state in Item #12/explanation, "Without senior resort management's knowledge, business agents and/or union officials weekly used validation machines used for vendors at the resort to stamp their parking tickets to avoid paying the parking fees that all guests were required to pay. When this practice was brought to the attention of the resort's legal counsel, the union was advised to stop this illegal activity ..." (GC Exhibit 4A - C) Additionally, these records establish that guests were required to pay parking fees. Respondents take exception to the ALJ's finding/conclusion that "There is no evidence that the resort charges anyone other than the business agents for parking at the resort." (SALJD at 2) (Exception # 11)

Even if Respondents had charged the Union business agents and been <u>paid</u> for parking on the Resorts property (and there is no documentary evidence to support this finding), the Union business agents had other means to gain access to the unit employees at the facility without need to pay the parking fee. Specifically, the Union business agents could park off the property and walk into the facility, ride the bus, have someone drop them off and pick them up at the facility, or carpool. Record testimony shows that many of Respondents' unit employees rode the bus and that Union business agents shared rides to the Resort. Therefore, there is no evidence that the alleged alteration of parking privileges actually burdened Union representatives, and by implication unit members, due to the alleged burden imposed on the Union business agents. Further, there is no evidence in the record that the Union business agents responded to the alleged change by parking off property and walking three quarters of a mile to the hotel, or that the tenminute walk substantially, materially, and significantly burdened unit employees.

Moreover, it is not the amount that the Union business agents were purportedly charged or the distance the Union business agents walked, but to what extent the change in practice impacted the bargaining unit employees. This is settled law. An employer only has an obligation to bargain with a union over those subjects that concern the wages hours, and other terms and conditions of the unit employees' employment. See *Chemical Workers v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971)( retirees were not "employees" within the meaning of Section 2(3) of the Act and their benefits did not "vitally affect" the terms and conditions of employment of bargaining unit employees and consequently were not a mandatory subject of bargaining). There is simply no requirement that an employer bargain with a union over union business agents' parking privileges,

irrespective whether the collective bargaining agreement contains a union access provision at least to the extent the access clause does not specifically provide for parking.

Nor does ALJ Cracraft cite to any such cases.<sup>9</sup>

The Board's recent decision in *Richmond Times Dispatch*, 346 NLRB No.11 (2005), cited by General Counsel in its brief in support of exceptions in the underlying case, is not to the contrary. In *Richmond Times*, the Board found an 8(a)(5) violation where an employer unilaterally changed its practice of paying union negotiators for time spent in collective bargaining negotiations. However, General Counsel failed to point out that those union negotiators were also unit employees. So, of course, the employer had an obligation to bargain with the union over a unilateral change in that instance as it affected the wages of bargaining unit members. The Union business representatives are not bargaining unit members.

In the instant case, the fee purportedly required of business agents to park at the Resort may have affected the agents, and possibly the Union, if agents paid for parking and the Union reimbursed Union business agents for that parking. However, there is absolutely no evidence that the fee affected the unit employees. The unit employees did not pay any parking fee for the Union business agents. Thus, the only plausible basis on which the alleged unilateral change could have impacted the bargaining unit was if the Union business agents visited the Resort less frequently. General Counsel failed to demonstrate that the Union business agents spent any less time at the Resort following

17

<sup>&</sup>lt;sup>9</sup> ALJ Cracraft, like ALJ Gontram, appears to subscribe to the school of thought that union parking privileges are a mandatory subject of bargaining and that any material change to the Union representatives parking privilege necessarily materially affect the unit employees. Neither ALJ Cracraft nor General Counsel provides any case law substantiating this position.

the alleged unilateral change in policy. To the contrary, the record is replete with evidence of multiple visits by multiple business agents to the Resort both before and after Respondents allegedly changed the parking fee policy. Consequently, the alleged unilateral change did not make a substantial, material, and significant change in the unit

employees terms and conditions of employment.

IV. **CONCLUSION** 

For all these reasons, no violation of Section 8(a)(5) and (1) should be found with regard to the alleged unilateral change in parking privilege. Consequently, the Board should dismiss the 8(a)(5) and (1) allegation with respect to the parking privilege.

Date: October 14, 2009

Respectfully Submitted,

**GORDON & REES LLP** 

Daniel T. Berkley

Charles O. Zuver, Jr

Attorneys for Respondents

BENCHMARK HOSPITALITY, INC., OAKTREE CAPITAL MANAGEMENT,

LLE, AND TBR PROPERTY, LLC d/b/a

TURTLE BAY RESORT

#### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that one copy of RESPONDENTS BRIEF IN SUPPORT OF EXCEPTIONS TO THE SUPPLEMENTAL DECISION OF THE ADMINISTRATIVE LAW JUDGE has this day been served as described below

by transmitting via e-mail the document listed above to the e-mail addresses set forth below on this date before 5:00 p.m. (PST), pursuant to §102.114 (a, i) of the Rules and Regulations of the NLRB:

1 copy Kristin L. Martin, Esq.

Davis, Cowell & Bowe LLP 595 Market Street, Suite 1400 San Francisco, CA 94105

klm@dcbsf.com

1 copy Jennifer Cynn

In-House Counsel

UNITE HERE! Local 5

1050 Queen Street, Suite 100 Honolulu, Hawaii 96814 jcynn@unitehere5.org

PH: 808-941-2141

1 copy Meredith A. Burns

Counsel for the General Counsel National Labor Relations Board

Subregion 37

300 Ala Moana Boulevard, Room 7-245

P.O. Box 50208 Honolulu, HI 96850 Meredith.burns@nlrb.gov

PH: 808-541-2814

1 copy Joseph P. Norelli

Regional Director

National Labor Relations Board REGION 20

901 Market Street, Suite 400 San Francisco, CA 94103-1735

Joseph.Norelli@nlrb.gov

DATED on October 14, 2009 at San Francisco, CA.

Mariene Cannova

Maileae Cannor

The undersigned hereby further certifies that RESPONDENTS BRIEF IN SUPPORT OF EXCEPTIONS TO THE SUPPLEMENTAL DECISION OF THE ADMINISTRATIVE LAW JUDGE was duly filed with the Office of the Executive Secretary of the NLRB in Washington D.C. pursuant to § 102.114 by transmitting via electronic filing the document listed above on this date before 5:00 p.m., PST.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 14, 2009 at San Francisco, California.

Marlene Cannova

Marlene Cannova